UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PFIZER INC.	)	
	)	
AND	)	**CASES 10-CA-175850**
	)	**07-CA-176035**
REBECCA LYNN OLVEY MARTIN, an individual	)	
	)	
AND	)	
	)	
JEFFREY J. REBENSTORF, an individual	)	
	)	

PFIZER INC.'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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Dated: December 21, 2018

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INTRODUCTION

Pursuant to Your Honor's November 27, 2018 Order, Pfizer Inc. ("Pfizer" or "the Company") submits this brief concerning the lawfulness of the confidentiality provision in Pfizer's Mutual Arbitration and Class Waiver Agreement ("Arbitration Agreement").

Your Honor's January 18, 2017 decision analyzed the confidentiality provision under the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *The Boeing Company*, 365 NLRB No. 154 (2017), overruling the *Lutheran Heritage* standard in favor of a new framework and balancing test. Then, on May 21, 2018, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), holding that arbitration agreements with class- and collective-action waivers must be enforced according to their terms under the Federal Arbitration Act ("FAA") and, further, that the National Labor Relations Act ("NLRA" or "Act") does not address the procedures for dispute resolution in court or arbitration and therefore does not override the commands of the FAA.

On October 18, 2018, the Board issued its decision and order remanding this case. The Board dismissed the allegation regarding the Arbitration Agreement's class and collective action waiver because *Epic Systems* held that arbitration agreements containing class and collective action waivers "do not violate [the NLRA] and that the agreements must be enforced as written pursuant to the Federal Arbitration Act." *Pfizer Inc.*, 367 NLRB No. 23, slip op. at 1 (Oct. 18, 2018). The Board severed and remanded the allegation that the Arbitration Agreement's confidentiality provision violates Section 8(a)(1) of the Act.

In this brief, Pfizer addresses two issues: (1) the effect of the Supreme Court's decision in *Epic Systems* on the enforceability of the confidentiality provision under the FAA, and (2) the analysis of the confidentiality provision under the *Boeing* standard.

Briefly stated, the first issue is that the confidentiality provision is part and parcel of a valid, enforceable arbitration agreement that must be enforced *according to its terms* under the FAA. Moreover, pursuant to the Supreme Court's decision in *Epic Systems*, any challenge to the enforceability of an arbitration agreement under the FAA's savings clause must be determined based on generally applicable contract defenses, such as the doctrine of unconscionability. Courts have repeatedly held that confidentiality provisions in arbitration agreements are enforceable and do *not* violate the common law principle of unconscionability. The confidentiality provision in Pfizer's Arbitration Agreement is lawful and enforceable based on this precedent. Similarly, a challenge to the provision may *not* be based on a defense that would apply only to arbitration, would derive its meaning from the fact that an agreement to arbitrate is at issue, or would interfere with a fundamental attribute of arbitration. Interpreting the NLRA to dictate whether arbitration proceedings may be confidential would do all three.

As to the second issue, while Pfizer maintains that the common law analysis is the proper one under *Epic Systems*, the confidentiality provision is lawful if it is analyzed as a work rule under the *Boeing* standard. The confidentiality provision is limited to the arbitration proceeding itself and it specifically disclaims any intent to interfere with the exercise of Section 7 rights, including protected, concerted discussions of wages, hours, and working conditions. This explicit disclaimer renders unreasonable any interpretation that would conflict with Section 7 rights. Furthermore, any potential adverse impact on Section 7 rights is outweighed by the legitimate justifications for the confidentiality provision – justifications that benefit both the employer and the employee.

For all of these reasons, which are explained more fully below, Your Honor should find that the confidentiality provision is lawful and dismiss this remaining complaint allegation.

STATEMENT OF FACTS

Pfizer is incorporated in the state of Delaware. Stipulation of Facts ("SOF") 1.[1] Pfizer employs approximately 32,000 employees in the United States, who are based at facilities located in 17 states and who work and transact business in all fifty states and the District of Columbia. SOF 2. On May 5, 2016, Pfizer sent an e-mail to employees informing them of the Arbitration Agreement, and instructing employees to read and acknowledge the Agreement. SOF 4; J. Ex. 1. The Arbitration Agreement applies to all Pfizer employees in the United States (except those who are covered by a collective bargaining agreement and those employed by a small subsidiary). SOF 8-9. Employees are not allowed to "opt out" of the Arbitration Agreement. They are bound to the Agreement as a condition of employment. SOF 10.

Pfizer's Arbitration Agreement contains the following provision regarding the confidentiality of the arbitration process:

> e. Confidentiality: The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

SOF 7.

[1] Prior to the November 4, 2016 hearing in this case, Pfizer and the General Counsel agreed to several stipulations of fact, which were memorialized and admitted into evidence as Joint Exhibit 1.

The Arbitration Agreement specifically provides that it "shall be governed and interpreted in accordance with the FAA." J. Ex. 2 at § 6.f.

ARGUMENT

I. The Confidentiality Provision Is Enforceable as Part and Parcel of the Arbitration Agreement under the FAA.

A. The FAA Mandates That Arbitration Agreements Be Enforced According to Their Terms.

The FAA establishes "a liberal federal policy favoring arbitration agreements" and there is a well-established framework for reviewing and enforcing such agreements through the courts. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *superseded on other grounds* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts")).

Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

B. Under the Supreme Court's Decision in *Epic Systems*, the Confidentiality Provision Must Be Enforced According to its Terms.

The Supreme Court's recent holding in *Epic Systems* makes clear that arbitration agreements, including "the rules under which that arbitration will be conducted," *Epic Sys.*, 138 S. Ct. at 1621 (internal quotations and citations omitted), must be enforced according to their terms under the FAA and that the NLRA does not override the commands of the FAA:

> The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.

Id. at 1632. *Epic Systems* specifically found that the FAA requires enforcement of the parties' chosen arbitration procedures: "Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures." *Id.* at 1621 (citing 9 U.S.C. §§ 3, 4). "Indeed, we have often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including . . . *the rules* under which that arbitration will be conducted.'" *Id.* (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)).

The Supreme Court's decision was *not* limited to class action waivers. Rather, the Court analyzed the connection between arbitration agreements and the NLRA more broadly and concluded that because the rules and procedures applied to workplace disputes in arbitration typically do not implicate Section 7 rights, the Board may not supersede the FAA by applying the NLRA to strike down the terms and procedures set forth in arbitration agreements. *See id.* at 1627 ("Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least . . . the Arbitration Act . . . ."); *Id.* at 1619 (Section 7 of the NLRA "secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."); *id.* at 1624 (Section 7 "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.").

The confidentiality clause in Pfizer's Arbitration Agreement is part and parcel of the arbitration process that is governed by the FAA. The Arbitration Agreement specifically

provides – in the section immediately following the confidentiality clause – that it "shall be governed and interpreted in accordance with the FAA." J. Ex. 2 at § 6.f.

In light of the FAA's mandate that arbitration agreements be enforced according to their terms, and the Supreme Court's ruling that the NLRA does not override the FAA, the confidentiality provision in the Arbitration Agreement must be enforced in accordance with its terms. *Id.* at 1632; *see also Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352 (11th Cir. 2014) ("The parties to the agreement we consider here have exercised their right to structure their arbitration agreements as they see fit . . . . It falls on courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." (internal citations and quotations omitted)).

C. The Confidentiality Provision Must Be Construed Based on Common Law Contract Principles, Rather Than the NLRA.

Under the FAA's saving clause, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court held in *Epic Systems*, this is an "'equal-treatment' rule for arbitration agreements," in that the saving clause "recognizes only defenses that apply to 'any' contract." *Epic Sys.*, 138 S. Ct. at 1622 (citing *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1426 (2017)). The saving clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "The clause, however, offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *Concepcion*, 563 U.S. at 339).

For this reason, the Supreme Court held that even assuming that the arbitration agreements at issue in *Epic Systems* violated the NLRA, the agreements could not be invalidated under the savings clause because it would not be a defense that applies to "any" contract. *See Epic Sys. Corp.*, 138 S. Ct. at 1622. Likewise, interpreting the NLRA to dictate whether arbitration proceedings can be confidential would apply only to arbitration, would derive its meaning from the fact that an agreement to arbitrate is at issue, and would interfere with a fundamental attribute of arbitration. *Id*. This is not permissible under *Epic Systems*.

The NLRA does not provide the governing standard for interpreting or determining the legality of the confidentiality clause in the Arbitration Agreement. According to *Epic Systems*, the Board may not import the NLRA's standards into the FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1629 ("Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.").

Under the FAA's savings clause, a confidentiality provision must be evaluated based on generally applicable defenses under contract law, such as the doctrine of unconscionability. Many courts have found that confidentiality provisions in arbitration agreements are valid and enforceable under general principles of contract law, and have rejected claims that such provisions are unconscionable. *See Asher v. E! Entm't Television, LLC*, No. CV 16-8919-RSWL-SSX, 2017 WL 3578699, at *7–8 (C.D. Cal. Aug. 16, 2017) (finding that the confidentiality clause was not unconscionable under California law because it only required confidentiality of information "generated" and exchanged during arbitration, which would not "impede Plaintiff's discovery and investigation capabilities or contact with witnesses during

litigation," and was "bilateral and allow[ed] disclosure when permitted by law or 'otherwise provided herein,' thus not fully creating a gag order on the parties as Plaintiff would argue"); *Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1258 (D. Kan. 2016) (refusing to strike a confidentiality clause as unenforceable because it would not impede the plaintiff's ability to advise potential witnesses about the lawsuit or engage in other activities necessary to support his claim); *Sanchez v. Carmax Auto Superstores Cal., LLC,* 224 Cal. App. 4th 398, 408 (2014) ("The second provision requiring confidentiality is not unconscionable. In regard to 'the fairness or desirability of a secrecy provision with respect to the parties themselves, . . . we see nothing unreasonable or prejudicial about it,' and it is not substantively unconscionable.") (quoting *Woodside Homes of Cal., Inc. v. Superior Ct.*, 107 Cal. App. 4th 723, 732 (2003); *Andrade v. P.F. Chang's China Bistro, Inc.*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *8 (S.D. Cal. Aug. 9, 2013) (upholding a confidentiality clause that prevented disclosure of any content exchanged during arbitration unless otherwise allowed by the law because it was not as broad as in a prior case where the plaintiff was expressly prohibited from contacting other employees "to assist in litigating or (arbitrating) an employee's case.") (internal quotations and citations omitted); *Boatright v. Aegis Def. Servs., LLC*, 938 F. Supp. 2d 602, 610 (E.D. Va. 2013) ("In the absence of Delaware precedent, in light of the existence of a similar, default confidentiality requirement in the standard AAA rules, and because the Court concludes that the requirement will not impede or burden Plaintiffs or future claimants such that they cannot pursue and obtain relief, the Court finds that the confidentiality requirement here is not unconscionable."); *Bettencourt v. Brookdale Senior Living Cmtys. Inc.*, No. 09-CV-1200-BR, 2010 WL 274331, at *7–8 (D. Or. Jan. 14, 2010) (finding the confidentiality clause enforceable under Oregon law and not void as against public policy).

Alternatively, courts may defer the interpretation of a confidentiality provision to the arbitrator who is charged with interpreting the agreement. *See, e.g., Kilgore v. KeyBank Nat'l Ass'n*, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) ("In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable."); *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1122 (C.D. Cal. 2015) (same).

Based on this precedent, the confidentiality provision in Pfizer's Arbitration Agreement is lawful and enforceable under the FAA. To the extent there is any question concerning the enforceability of the confidentiality provision based on common law contract principles, that question should be answered by a court or an arbitrator under the Arbitration Agreement. *Epic Systems* makes clear that this is not an issue to be decided by the Board under the NLRA. *Epic Sys. Corp.*, 138 S. Ct. at 1627 ("It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.").

II. Even If Analyzed as a Work Rule to Be Interpreted under the NLRA, the Confidentiality Clause Is Lawful under the *Boeing* Standard.

Even if the Board were to analyze the Arbitration Agreement's confidentiality provision under the NLRA, rather than applying general principles of contract law as mandated by the FAA's savings clause and *Epic Systems*, the confidentiality provision is a lawful Category 1 rule under the *Boeing* standard. A work rule is lawful under Category 1 of the *Boeing* standard if "(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications

associated with the rule." *Boeing*, 365 NLRB No. 154, slip op. at 3-4. Here, the confidentiality provision satisfies either prong of this standard.

A. The Confidentiality Provision Is a Lawful Category 1 Rule Because, When Reasonably Interpreted, It Does Not Prohibit or Interfere with the Exercise of Section 7 Rights.

The confidentiality provision, when reasonably interpreted, does *not* interfere with employees' Section 7 right to discuss their terms and conditions of employment. The confidentiality clause only restricts the dissemination of "the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award …." SOF 7. Thus, the confidentiality provision is limited to the arbitral proceeding and the information and documents disclosed during the proceeding. The confidentiality provision also specifically disclaims any interpretation that would prohibit employees from exercising their Section 7 right discuss their terms and conditions of employment:

> [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.]

SOF 7.

Given this explicit disclaimer, the confidentiality provision cannot be reasonably interpreted to interfere with employees' Section 7 rights. It does *not* prohibit employees from discussing the facts and circumstances that led to the arbitration proceeding or from marshalling evidence in support of their claims. Indeed, the confidentiality provision makes clear that it does *not* prohibit employees from seeking out witnesses and evidence in support of their claims. SOF 7 ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding.").

The confidentiality provision also does *not* prohibit employees from concertedly complaining about, or challenging, the Arbitration Agreement itself or its procedures. The Arbitration Agreement explicitly recognizes employees' right to challenge the Agreement and dispels any fear that employees may be disciplined if they choose to do so. *See* J. Ex. 3, at 2 ("You have the right to challenge the validity of the terms and conditions of this Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against you in the event you choose to do so.").

Because the confidentiality provision cannot be reasonably interpreted to prohibit or interfere with the exercise of Section 7 rights, it is lawful as a Category 1 rule under the *Boeing* standard.

B. The Confidentiality Provision Is a Lawful Category 1 Rule Because Any Potential Adverse Impact on Section 7 Rights Is Outweighed by Legitimate Justifications for the Provision.

Alternatively, under Category 1 of the *Boeing* standard, a work rule is lawful if the legitimate justification for the rule outweighs any potential adverse impact on Section 7 rights. *Boeing*, 365 NLRB No. 154, slip op. at 4.

In this case, the confidentiality provision is lawful based on the legitimate interest in fostering trust and confidence in the arbitration process as an alternative dispute resolution procedure. There is a well-established justification for confidentiality in alternative dispute resolution procedures. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (noting that "the plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself"). It is analogous to Federal Rule of Evidence 408, which protects from disclosure "[e]vidence of conduct or statements made in compromise negotiations." *St. George Warehouse, Inc.*, 349 NLRB 870, 872-74 (2007) (holding that

comments made during mediation of unfair labor practice charges and collective bargaining disputes were inadmissible under Federal Rule of Evidence 408).

The Board itself has recognized the value of confidentiality in its own alternative dispute resolution procedures. *See* Alternative Dispute Resolution Program, at https://www.nlrb.gov/what-we-do/decide-cases (last visited December 16, 2018) ("The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation and Conciliation Service or the ADR program director, to facilitate *confidential* settlement discussions and explore resolution options that serve the parties' interests." (emphasis added)).

Courts have recognized the legitimate justifications for treating arbitration proceedings as confidential, as well as the fact that confidentiality can benefit both parties – not just employers. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 n.4 (1st Cir. 1999) (observing, in an employment case, that both sides might prefer the confidentiality of arbitration); *Asher*, 2017 WL 3578699, at *7–8 (finding that the confidentiality clause was not unconscionable under California law because, among other reasons, it was "designed to protect all parties in a dispute"); *see also Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 280 (3d Cir. 2004) (holding that the district court erred in finding confidentiality provisions unconscionable because "[e]ach side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party vis-a-vis the other in the dispute resolution process," "the confidentiality of the proceedings will not impede or burden in any way [the employee's] ability to obtain any relief to which she may be entitled," and confidentiality does not violate the public policy goals of either Title VII or the ADEA).

The Judicial Arbitration and Mediation Service ("JAMS"), the arbitration provider under Pfizer's Arbitration Agreement, also recognizes the benefits of confidentiality in arbitration proceedings in its rules. Rule 26, entitled Confidentiality and Privacy, provides:

> (a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

Rule 26, JAMS Employment Arbitration Rules.[2]

Thus, the legitimate justifications for the confidentiality provision are plentiful and well-founded. Those legitimate justifications outweigh any theoretical impact the confidentiality provision could have on the exercise of Section 7 rights. Therefore, the confidentiality provision is lawful under Category 1 of the *Boeing* standard even if some impact on Section 7 rights is found.

C. If Analyzed as a Category 2 Rule, the Confidentiality Provision Is Lawful.

Category 2 of the *Boeing* standard encompasses "rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *Boeing*, 365 NLRB No. 154, slip op. at 4.

The confidentiality provision in Pfizer's Arbitration Agreement cannot be reasonably interpreted to prohibit or interfere with Section 7 rights, for the reasons discussed above – not the least of which is the provision's explicit disclaimer of any interpretation that would interfere with employees' Section 7 right to discuss their terms and conditions of employment.

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[2] Available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf.

But even if some theoretical adverse impact is found despite that explicit disclaimer, the impact is outweighed by the well-established, legitimate justifications discussed above. Confidentiality is important to make the arbitration process work effectively as an alternative dispute resolution mechanism. That legitimate justification outweighs any potential impact on conduct protected by the NLRA. Therefore, the confidentiality provision is lawful under Category 2 because it strikes an appropriate balance between protecting Pfizer's legitimate objectives in designing an effective dispute resolution process while at the same time safeguarding employees' right to engage in protected, concerted activity under the NLRA.

CONCLUSION

For the foregoing reasons, the Arbitration Agreement's confidentiality provision is lawful and the allegation of the Consolidated Complaint pertaining to the confidentiality provision should be dismissed.

Date: December 21, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer Inc.'s Brief to the Administrative Law Judge have been served upon the following this 21st day of December 2018 by e-mail:

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